UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OLYMPIC SUPPLY, INC. d/b/a ONSITE NEWS,

Respondent,

and

Case No. 5-CA-076019
5-RD-001500

UNITE HERE! LOCAL 7,

Charging Party.

Matthew J. Turner and John D. Doyle, Jr., Esqs.,
for the General Counsel.
Charles Hildebrandt, Esq. (The Roberts Law Group),
of Washington, DC, for the Respondent.
Krista Strothmann, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Baltimore, Maryland on August 27, 2012. The charging party, "Unite Here! Local 7" (the Union), filed the charge on March 6, 2012[1] and the General Counsel issued the complaint on May 24, 21012 alleging that Olympic Supply, Inc. d/b/a Onsite News (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[2] by: (1) during an unspecified time in or around mid-February 2012 at one of its Baltimore Washington International Marshall Airport (BWI) concessions, threatening employees with stricter enforcement of its work rules if they voted for the Union in an upcoming decertification election; and (2) on or about February 23, 2012 at it BWI location, again threatening employees with stricter enforcement of its work rules if the employees voted for the Union in the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments by the parties at trial and the post-hearing brief filed by the General Counsel,[3] I make the following

[1] All dates are 2012 unless otherwise indicated.
[2] 29 U.S.C. Secs. 151–169.
[3] Neither the Company nor the Charging Party submitted post-hearing briefs.

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation, with an office and place of business in Mitchellville, Maryland, has been engaged in the operation of retail concessions at BWI, where it annually derives gross revenues in excess of $500,000. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company operates retail and newspaper concessions at BWI. London Perry has been the Company's general manager at BWI since 2008.[4] The Company employs 32 employees at BWI, including 4 supervisors, 3 managers, and sales associates, stock clerks and runners at its six airport locations.

The charges arise out of Perry's interaction with two sales associates, Kevin Wheeler and Monae Whitehead, regarding his enforcement of Company rules and the role of the Union.[5] The conversations took place at or near one of the Company's BWI concession locations known as UL-6. Wheeler has been employed by the Company at BWI since July 2011, joined the Union in October of 2011 and took an active role with the Union in December 2011.[6] Whitehead has been employed by the Company since 2010 but, unlike Wheeler, has never been a Union supporter or member.

B. The Company's Relationship With The Union

Since at least April 23, 2007, the Union has been the collective-bargaining representative of the following unit of the Company's employees (the bargaining unit):

> All regular full-time and regular part-time retail and food and beverage concession employees, including lead associates, sales associates, and stock associates employed by each of the Employers at Baltimore Washington International Airport; but excluding all other employees, clerical workers, security guards, managers, and supervisors as defined in the Act.[7]

[4] The Company admitted in its answer that Perry has been a Company supervisor within the meaning of Section 2(11) of the Act and agent within the meaning of Section 2(13) of the Act.

[5] No written evidence of the rules was offered, but their existence is not disputed.

[6] Wheeler conceded on cross-examination that, although he referred to himself at times as a Union shop steward, he had no formal designation as such. (Tr. 39-40, 50-52.) Nevertheless, his role as a Union advocate was not challenged and appeared credible.

[7] Joint Exh. 1.

The most recent collective-bargaining agreement (CBA) between the Union and the Company was effective from April 23, 2007, through April 22, 2011, having automatically renewed on April 22, 201 0, pursuant to Section 26.1 of said agreement.[8]

On February 22, 2011, two months before the CBA expired, the Company sent the Union a written notice of termination:

> After careful consideration of the present business environment, the best interest of the company and considering the employees' petition to decertify the Union filed in August 2010, pursuant to Article 26.1 of the Collective Bargaining Agreement., we hereby terminate the Collective Bargaining Agreement, with UNITE Here, Local 7, effective April 22, 20 11.
>
> Of course, we will continue to discuss proposals for a new Collective Bargaining Agreement. I am available on Tuesday, March 1, 2011 at 11:30 am, in my D.C. Office to speak with you to continue negotiations regarding a new Collective Bargaining Agreement.[9]

On April 25, 2011, Selena Lumpkins, a Company employee, filed a petition with the National Labor Relations Board's Regional Office for Region 5 (the Regional Director). The petition, designated as Case 5-RD-1500, sought to decertify the Union as the bargaining unit's collective-bargaining representative.[10]

C. The Election

On May 5, 2011, the Regional Director approved a Stipulated Election Agreement in Case 5-RD-1500 executed by Company and Union representatives. With respect to the time and place of the election, however, the agreement noted that the "Date, Hours and Place will be determined by the Regional Director following the disposition of any blocking unfair labor practice charge."[11]

On February 15, after the disposition of blocking unfair labor practice charges in cases 5-CA-36588 and 5-CA-63228 and pursuant to the Stipulated Election Agreement in Case 5-RD-1500, Region 5 reopened the processing of the petition in Case 5-RD-1500. On March 2, Region 5 notified the parties of the details of the election to be held in Case 5-RD-1500 on March 9.[12]

On March 9, a secret-ballot election was conducted under the direction and supervision of the Regional Director in the bargaining unit. The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	30
Void ballots	0
Votes cast for Intervenor	7
Votes cast against participating labor organization	15

[8] Joint Exh. 1, Paragraph 2, Attachment A.
[9] Joint Exh. 1, Paragraph 3, Attachment B.
[10] Joint Exh. 1, Paragraph 4; GC Exh. 1-A.
[11] Joint Exh. 1, Paragraph 5.
[12] Joint Exh. 1, Paragraphs 6-8.

Valid votes counted	22
Challenged Ballots	0
Valid votes counted plus challenged ballots	22

A majority of the valid votes counted plus challenged ballots were not cast for the Union as Intervenor. On May 4, the Union filed 6 timely objections to conduct affecting the results of the election. On May 25, the Regional Director issued a Report on Objections and Notice of Hearing. In his Report, the Regional Director found that Objection 1 raised issues of fact and credibility that were similar to the facts alleged in the instant unfair labor practice proceeding, Case 5-CA-076019. Objection 1 alleged that the Company, in or around February 2012 and prior to the election, threatened employees with stricter enforcement of rules if employees were represented by the Union. Accordingly, the unfair labor practice and representation cases were consolidated for trial.[13]

D. Perry's Conversation with Wheeler

The issue in both cases is whether Perry, during the period leading up to the election, engaged in conversations with Wheeler and Whitehead constituting unfair labor practices and conduct sufficiently objectionable to invalidate the decertification election.

In Wheeler's case, his conversation with Perry was preceded by the filing of a Step One grievance on February 8, 2012 alleging the violation of his seniority rights under Article 11.2 of the CBA. The written grievance did not provide any other details.[14] The Step One grievance meeting was held on February 23 in the stock room adjacent to UL-6. Union organizer Margaret Ellis accompanied Wheeler to the meeting.[15] At the meeting, she asserted that Wheeler's hours had been reduced in violation of the CBA's seniority provisions. Perry initially replied that business was slow and everyone's hours had been reduced. After Ellis responded that Wheeler's reduction in hours was attributable to his involvement in collective bargaining, Perry said that it was due to his tardiness. Wheeler, however, has never been subjected to any form of discipline for tardiness. The meeting ended after Perry refused to reinstate Wheeler's hours and provide backpay.[16]

After the meeting, Wheeler returned to work at UL-6. Ellis followed him and they discussed the grievance meeting. Shortly thereafter, Perry approached them and stated that Wheeler was not supposed to be talking to a Union representative while working. Ellis left and Perry continued the discussion. He showed Wheeler a record of instances in which he arrived late,[17] but quickly pivoted to the subject of the Union. Perry advised Wheeler that, in the future,

[13] No evidence was submitted in support of Objections 2-6 and they were dismissed. (GC Exh. 1-L)

[14] GC Exh. 4.

[15] Ellis did not testify.

[16] I base these findings primarily on Wheeler's testimony. (Tr. 44-45.) He was fairly credible, while Perry was somewhat evasive in his answers and much of his testimony as a Rule 611(c) witnesses was nonresponsive ("e.g., that's what the paper said").He also demonstrated a selective lack of recollection of certain events. In the case of the stock room meeting, he initially failed to recall the encounter. Subsequently, he provided contradictory testimony as to the reason why he reduced Wheeler's hours. Initially, he testified that the reduction was due entirely to Wheeler's habitual lateness. However, as the questioning proceeded, he added that it was also a part of an overall reduction in hours for employees. (Tr. 16-17, 44-45.)

[17] Wheeler conceded that Perry showed him a record detailing his lateness to work. (Tr. 47.)

he should speak to Perry directly about any problems rather than relying on the Union. Otherwise, Perry would have to be stricter if the Union continued to be involved. Wheeler rejected the overture, insisted that Perry should have issued a written discipline if lateness was indeed a problem and asked for clarification as to what Perry meant by the Union's involvement. Perry explained that he would have to be stricter because he would have to comply with the CBA provisions. Perry concluded the conversation by noting that he would rather be lenient in such situations, but would have to strictly apply the rules if the Union remained as the employees' bargaining representative.[18]

E. Conversation between Perry and Whitehead

The other alleged infraction also occurred during February 2012. On that occasion, Whitehead approached Perry in the hallway area near UL-6 and told him that she did not want the Union to continue as her labor representative. Perry responded that, "if the Union came in, he would have to start going by the book. He said he had been lenient with employees, but if the Union came in, then he would have to start going by the book."[19]

LEGAL ANALYSIS

I. Section 8(a)(1) Charges

The General Counsel contends that the Company violated Section 8(a)(1) of the Act by threatening Wheeler and Whitehead during February 2012 with stricter enforcement of work rules if the Union continued as their labor representative. The Company denies that Perry's remarks constituted threats and insists that he was simply conveying an intention to continue adhering to Company rules if the Union continued representing its employees.

In analyzing a Section 8(a)(1) charge, "[t]he test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.,* 124 NLRB 146, 147 (1959). Section 8(a)(1) violations do not turn on the employer's motive or on whether the coercion succeeded or failed. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991);

Perry informed Wheeler and Whitehead during February, the month prior to the election, that he would cease being lenient and have to be stricter if the Union continued serving as the

[18] I based this finding on Wheeler's testimony (Tr. 45-48.), as corroborated by Perry's testimony. Perry conceded that he told Wheeler he could no longer tolerate lateness as he had done previously and would be documenting such infractions in order to avoid problems with the Union. (Tr. 23-24). On rebuttal, he offered the conclusory assertion that he never told Wheeler that he would more strictly enforce the rules if the Union were to win the decertification vote. He did not, however, backtrack from earlier testimony regarding the effect of the Union's continued role on how he would address instances of lateness. (Tr. 35.)

[19] Whitehead's initial testimony appeared tentative and was punctuated with frequent glances toward Perry at counsel's table. (Tr. 69-71.) The selectivity of that testimony became evident when the General Counsel, to her dismay, impeached her testimony with a sworn affidavit detailing the full extent of Perry's remark about the effects of the Union "coming in." (Tr. 74-77.) I found the statements in Whitehead's affidavit, which she did not disavow, more reliable than her testimony. Moreover, Perry, during his rebuttal testimony, did not refute either her testimony or the statements in her affidavit. (Tr. 89.)

bargaining unit's labor representative. These comments, which were made during the month leading up to the union decertification election, were not predictions of the effects of unionization based on objective fact; nor did they address consequences beyond the Company's control. *NLRB v. Gissel Packing Co.*, 395 U.S. at 618; *Systems West, LLC*, 342 NLRB 851 (2004).

As noted by the General Counsel, the lack of any objective basis for Perry's statements that he would have to forego leniency is evident from both historical and representational perspectives. First, it is undisputed that Perry had been lenient previously in addressing employee lateness. Secondly, during those periods of leniency, employees had been represented by the Union. There is no evidence, however, that the Union ever grieved such a practice. Hence, there was no basis for the assertion that the Union would suddenly begin to grieve such leniency if it prevailed in the decertification election.

Accordingly, Perry's statements to Wheeler and Whitehead constituted unlawful threats to enforce tardiness rules more strictly if the Company remained unionized. See also *DHL Express, Inc.*, 355 NLRB 1399, 1402-1405 (2010) (employer violated Section 8(a)(1) by informing employee that, if the union prevailed in the upcoming election, he would be less flexible and be compelled to more strictly enforce tardiness policy); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004) (unlawful for employer to tell employees that the presence of a union would cause it to be less lenient and strictly enforce break times rules); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (employer violated Section 8(a)(1) by informing employees, while waiving proposed collective bargaining agreement, that shop would be run "strictly by union rules"); *Treanor Moving & Storage Co.,* 311 NLRB 371, 375 (1993) (unlawful for employer to tell employees that it "used to let you guys get away with this kind of stuff" but "now you are union and you guys are playing your game and the company is going to have to play by their game").

Perry's remarks are distinguishable from situations where an employer conveys relatively innocuous statements of its intent to adhere to specific provisions in a collective bargaining agreement. *Dish Network Corporation*, 358 NLRB No. 29, slip op. at 1 (2012) (employer may inform its employees that unionization will bring about "a change in the manner in which employer and employee deal with each other); *International Baking Co.*, 348 NLRB 1133, 1135 (2006) (employer's explanation that it would be unable to be flexible with lateness policy, if a disciplinary provision was included in collective bargaining agreement, was not unlawful); *Ben Venue Laboratories*, 317 NLRB 900, 900 (1995), enfd. 121 F. 3d 709 (6th Cir. 1997) (employer's announcement that it would discontinue its open door policy if employees voted to unionize not unlawful); *FGI Fibers*, 280 NLRB 473, 473 (1986) (employer's statement that it would discontinue open door policy if Union was voted in because it would be required to go through grievance and other union procedures not unlawful); *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (employer's remark that his "informal and person-to-person" interaction would change and operations run "by the book, with a stranger" was not unlawful); *United Artists Theatre*, 277 NLRB 115, 115 (1985) (employer's statement that employees would vote away their right to deal with management directly if they voted for the Union not unlawful).

II. The Union Objection to the Election

The Union's Objection 1 asserts that the Company, in or around February, threatened employees with stricter enforcement of rules if they were represented by a Union. As previously found, Perry informed at least two employees, Wheeler and Whitehead, in February that he would be less flexible and forced to be stricter in enforcing Company rules if the Union continued to serve as the bargaining unit's labor representative. In addition to constituting unfair

labor practices, Perry's remarks amounted to conduct that destroyed the laboratory conditions during the critical period and should be sustained. *Eaton Technologies, Inc.,* 322 NLRB 848, 853-854 (1997); *Peck Incorporated,* 269 NLRB 451, 459 (1989).

Perry's remarks to two people in different scenarios – one a Union supporter, while the other was opposed to the Union – during the month leading up to the election, strongly suggests that his comments were not limited to those employees. Under the circumstances, the May 9 election must be set aside and a second election ordered. It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period where a Section 8(a)(1) violation of the type here interferes with the exercise of free speech and untrammeled choice in an election. *White Plains Lincoln Mercury,* 288 NLRB 1133, 1137-1138 (1988).

CONCLUSIONS

1. The Company, Olympic Supply Inc. d/b/a Onsite News, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, UNITE HERE! Local 7, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, London Perry has been a supervisor of the Company within the meaning of Section 2(11) of the Act and an agent of the Company within the meaning of Section 2(13) of the Act.

4. By threatening employees with stricter enforcement of work rules if they supported the Union, the Company violated Section 8(a)(1) of the Act.

5. The aforementioned unlawful conduct engaged in by the Company constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. By the foregoing violations of the Act, which occurred during the critical period before the May 9 election, and by the conduct cited by the Union in Objection 1, the Company has prevented the holding of a fair election, and such conduct warrants setting aside said election in Case 5-RD-001500.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Company, Olympic Supply Inc. d/b/a Onsite News, of Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with stricter enforcement of work rules if they support the Union or any other labor organization as their labor representative.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facilities within Baltimore Washington International Airport copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since February 23, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the election held on May 9, 2012, in Case 05-RD-001500, be set aside, and that this case be severed and remanded to the Regional Director to conduct a new election when he deems appropriate.

Dated, Washington, D.C. September 28, 2012

_____
Michael A. Rosas
Administrative Law Judge

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with stricter enforcement of our work rules if you select UNITE HERE! Local 7, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Olympic Supply Inc. d/b/a Onsite News
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center – Tower II, 100 South Charles Street, Suite 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.